

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

MARK MORRIS

Claimant

VS.

E & V MOTORS, INC.

Respondent

AND

LIBERTY MUTUAL INSURANCE COMPANY

Insurance Carrier

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Docket No. 1,017,720

ORDER

Claimant appeals the July 1, 2005 Award of Administrative Law Judge Bruce E. Moore. Claimant was denied benefits after the Administrative Law Judge (ALJ) determined that claimant had failed to provide timely notice of accident and had further failed to prove that there was just cause for this lack of timely notice. The Appeals Board (Board) heard oral argument on November 18, 2005.

APPEARANCES

Claimant appeared by his attorney, Mitchell W. Rice of Hutchinson, Kansas. Respondent and its insurance carrier appeared by their attorney, Janell Jenkins Foster of Wichita, Kansas.

RECORD AND STIPULATIONS

The Board has considered the record and adopts the stipulations contained in the Award of the ALJ. Additionally, the parties acknowledged during oral argument before the Board that claimant's average weekly wage for the purposes of this Award is \$455.99. This computes to a temporary total disability rate of \$304.01. Any award in this matter will be re-computed accordingly. The parties further agreed that claimant was entitled to 53.43 weeks temporary total disability compensation at the appropriate rate if the Board determines that the ALJ's decision regarding notice and just cause should be reversed.

ISSUES

1. Did claimant provide timely notice of accident as required by K.S.A. 44-520?
2. If claimant failed to provide timely notice of accident, was there just cause for claimant's failure?
3. What is the nature and extent of claimant's injury? The parties stipulate that as claimant has returned to employment at a comparable wage, any award in this matter would be limited to claimant's functional impairment.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be affirmed.

The Award sets out findings of fact and conclusions of law in some detail and it is not necessary to repeat those herein. The Board adopts those findings and conclusions as its own.

Claimant alleges accidental injury on October 2, 2002, when, as he was stepping off of a semi-trailer owned by respondent, he missed the bottom step and landed hard. Claimant testified he felt no immediate pain, but did state that he felt like he "kind of compressed everything together."¹ Claimant testified that by that afternoon, he was feeling pain. Claimant's condition continued to worsen to where by the second week of December, he was experiencing symptoms into his legs. He then reported the incident to Ruth Alexander, respondent's office manager.

K.S.A. 44-520 obligates a claimant to report an accident to his or her employer within ten days after the date of accident. However, that ten-day notice provision will not bar any proceedings under the Workers Compensation Act if the claimant shows that "a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident"

In this matter, claimant advised respondent of the incident on December 12, 2002, 72 days after the date of accident. If claimant proves that there was just cause for his

¹ R.H. Trans. at 12.

failure to notify respondent of the accident within ten days, then notice on the 72nd day would satisfy the requirements of K.S.A. 44-520.

Certain factors which may be considered in determining whether just cause exists include:

- (1) The nature of the accident, including whether the accident occurred as a single, traumatic event or developed gradually.
- (2) Whether the employee is aware they have sustained either an accident or an injury on the job.
- (3) The nature and history of claimant's symptoms.
- (4) Whether the employee is aware or should be aware of the requirements of reporting a work-related accident, and whether the respondent has posted notice as required by K.A.R. 51-13-1 (currently 51-12-2).²

When just cause is an issue, the above factors should be considered, but each case must be determined based upon its own facts. In this instance, claimant suffered a specific incident on October 2, 2002. He did not plead and did not prove any additional traumatic incidents after that date. The incident on October 2, 2002, was apparently significant enough in claimant's mind that approximately two and a half months later he was able to specifically discuss that incident with Ms. Alexander. While claimant could not remember the exact date, the information provided to Ms. Alexander allowed her to review records and determine specifically the date on which claimant's alleged injury occurred.

While claimant testified he did not have a specific incident of pain, he did testify that the accident caused him to feel compressed. By the end of the day, claimant was experiencing pain. There is no testimony in this record from claimant that his pain ever subsided, but instead it continued to worsen. Finally, Ms. Alexander testified that at the time of claimant's accidental injury, information regarding the workers compensation process was posted in the north office.

It is clear claimant has failed to satisfy the ten-day requirement of K.S.A. 44-520 with regard to notice, as claimant acknowledged he did not advise respondent of this accident until December 12, 2002, well beyond the ten-day time limit set forth in the statute. The Board also finds, as did the ALJ, that claimant failed to demonstrate just cause for his failure to give notice. Claimant testified that he had ongoing back pain as a regular incident of his employment. However, the fact that claimant had a specific traumatic incident, which he was able to recall almost two and a half months later, is a significant indication that

² *Russell v. MCI Business Services*, No. 201,706, 1995 WL 712402 (Kan. WCAB Oct. 9, 1995).

claimant was aware that the incident of October 2, 2002, was more than just the normal low back ache from his employment duties.

The Board, therefore, finds that the Award of the ALJ, denying claimant compensation for failure to provide notice of accident pursuant to K.S.A. 44-520, should be affirmed.

In all other regards, the Award of the ALJ is affirmed insofar as it does not contradict the findings and conclusions contained herein.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Bruce E. Moore dated July 1, 2005, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of December, 2005.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Mitchell W. Rice, Attorney for Claimant
Janell Jenkins Foster, Attorney for Respondent and its Insurance Carrier
Bruce E. Moore, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director